EXXONMOBIL EXPLORATION AND PRODUCTION MALAYSIA INC

v.

KESATUAN PEKERJA-PEKERJA EXXONMOBIL EXPLORATION AND PRODUCTION MALAYSIA INC & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[APPLICATION NO: R1-25-191-2003]
12 JULY 2004

LABOUR LAW: *Industrial Court - Jurisdiction - Collective Agreement - Trade union - Union leave - Refusal by employer to approve union leave - Dispute pertaining to terms of employment of workman eligible for union leave - Whether essentially a trade dispute - Filing of complaint of non-compliance with Industrial Court - Whether inappropriate - Industrial Court - Whether having no jurisdiction to hear complaint - Industrial Relations Act 1967 ss. 6, 18, 26, 56*

This was an application for *certiorari* to quash the decision of the Industrial Court dismissing the applicant's application for a direction that the Industrial Court should refrain from hearing the first respondent's complaint of non-compliance without first hearing and determining the applicant's application for interpretation of art. 45 of the collective agreement. The facts were that the first respondent union ('the union') had entered into a collective agreement with the applicant/employer. The collective agreement *inter alia* made provisions relating to union leave and art. 45 thereof stated that leave for union business "shall be in accordance with the Industrial Relations Act 1967 and shall be applied on the form as shown in the Fourth Schedule for prior approval". Subsequently, a committee member of the union applied for business leave, albeit not in the form prescribed in the Fourth Schedule. The application was turned down by the applicant on grounds of operational constraints. Dissatisfied, the union filed a complaint of non-compliance with the Industrial Court which proceeded to hear the same. Midway through the trial, the applicant, however, submitted an application for the interpretation of art. 45 hereof, and pending that applied for a stay of the hearing of the complaint of non-compliance. The Industrial Court refused to grant any stay, and decided to proceed with the hearing of the complaint of non-compliance. Hence, the application for *certiorari* herein.

Held (allowing the application):

[1] This case involved a dispute between the employee and the union pertaining to the terms of employment of workmen who were eligible for union leave. That being so, the dispute ought to be resolved through the trade dispute resolution process as provided for in ss. 18 and 26 of the Industrial Relations Act 1967 ('the Act'). (p 171 d-e)

[2] The Union should not have lodged a complaint of non-compliance under s. 56 of the Act. This was because s. 56 of the Act is a summary enforcement procedure for clear-cut cases of non compliance of a term of an award or collective agreement. As can be gleaned from the authorities, recourse to s. 56 is only permitted in 'clear and uncontroverted cases of mere non-compliance'. (p 171 f)

[3] The question to be asked was whether the matter before the Industrial Court was a clear and uncontroverted case of mere non-compliance. On the facts, the matter was not a clear and uncontroverted case of mere non-compliance. The real issue before the Industrial Court was on the interpretation of art. 45 of the collective agreement read with s. 6 of the Act and the application for leave in the form set out in the Fourth Schedule. It followed that the union ought not to have made a complaint under s. 56 of the Act alleging non-compliance when its interpretation of the said article, section and form was disputed by the applicant. (p 174 c-d)

[3a] The Industrial Court had no jurisdiction to hear the complaint of non-compliance under s. 56 of the Act, as the matter should have proceeded either as a trade dispute or an application for interpretation. There was an error on the part of the Industrial Court. (p 174 g)

[4] The interpretation of art. 45 concerned the question whether the granting of the union business leave was as of right or whether it was subject to the discretion of the applicant taking into consideration its operational constraints. In coming to its conclusion on the interpretation of art. 45, it was not sufficient that the Industrial Court merely examined the word 'shall' appearing in art. 45 of the collective agreement and s. 6 of the Act or construed the terms of the Fourth Schedule. It would require the Industrial Court to embark on an extended exercise of interpreting the articles of the collective agreement and s. 6 of the Act together with the prescribed form as set out in the Fourth Schedule. (p 174 e-f)

[Certiorari issued.]

Case(s) referred to:

Dragon & Phoenix Bhd v. Kesatuan Pekerja-pekerja Perusahaan Membuat Textil dan Pakaian Pulau Pinang & Anor [1991] 1 MLJ 89 SC ***(refd)***

Dunlop Industries Employees Union v. Dunlop Malaysian Industries Bhd & Anor [1987] 2 MLJ 81 SC ***(refd)***

Holiday Inn, Kuala Lumpur, National Union of Hotel, Bar and Restaurant Workers [1988] 1 MLJ 306 SC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 6, 18, 26, 56

For the appellant - Lim Heng Seng (Peter Chater); M/s Lee Hishamuddin
For the respondent - R Sivarasa; M/s Daim & Gamany

Reported by WA Sharif

JUDGMENT

Raus Sharif J:

This is an application by Exxonmobil Exploration and Production Malaysia Inc (the applicant) for an order for *certiorari* to quash the decision of the Industrial Court handed down on 29 August 2003. The decision was in respect of the dismissal of an oral application made by the applicant for direction of the Industrial Court that the Industrial Court ought not to hear the complaint of non-compliance by the union (the first respondent) without first hearing and determining the application for interpretation of art. 45 of the collective agreement.

Briefly, the material facts in respect of the disputes between the applicant and the first respondent which led to the application by the applicant are as follows.

The applicant and the first respondent entered into a collective agreement dated 29 November 2001. The Industrial Court has taken cognizance of the collective agreement. The collective agreement made provisions regarding union leave as follows:

> Article 45 – LEAVE FOR UNION BUSINESS (FOURTH SCHEDULE)
>
> Leave for Union business shall be in accordance with the Industrial Relation Act, 1967.
>
> Such leave application shall be submitted on the form as shown in the Fourth Schedule for prior approval.

The Fourth Schedule of the collective agreement provides the applicant with the discretion whether to approve or not to approve the application for leave and if approved, whether with or without pay.

On 2 December 2002, some of the employees of the applicant who were EXCO members of the first respondent applied for union leave to attend the EXCO meeting on 12 December 2002. However the EXCO members did not submit the application for union business leave in the form set out in the Fourth Schedule of the collective agreement.

The applicant granted conditional approval to the application, the same being subject to both operational constraints and the application by the said employees in the prescribed form set out in the collective agreement, if they were scheduled to work. On 9 December 2003, the applicant notified to Zulakmal bin Omar, an officer of the first respondent that due to operational constraints he could not be released to go on union business leave. The said Zulakmal bin Omar was the key technician in the recommissioning of the Lawang Platform Project.

The first respondent being dissatisfied with the applicant's decision filed a complaint of non-compliance to the Industrial Court. The applicant raised a preliminary objection when the complaint of non-compliance came up for hearing on 16 June 2003 on the ground that the first respondent did not comply with the grievance procedure set out in the collective agreement prior to filing the complaint of non-compliance. The Industrial Court reserved its ruling on the preliminary objection until the end of the trial of the complaint of non-compliance and proceeded with the trial by hearing the first respondent's case. The first witness for the first respondent, one Zulakmal bin Omar gave his evidence in chief. The matter was part-heard and the Industrial Court fixed the same for continued hearing on 29 August 2003. During the interval, the applicant changed its solicitors in respect to the conduct of the matter. Upon the advice of the solicitors, the applicant filed the following prior to the continued trial date of the non-compliance application:

a. Application for interpretation of art. 45 of the collective agreement;

b. Complaint of non-compliance with art. 45 of the collective agreement by the first respondent; and

c. A report of trade dispute between the applicant and the first respondent in respect of the implementation and application of art. 45 of the collective agreement to the Director General of Industrial Relations.

Accordingly, the counsel of the applicant applied to stay the trial of the complaint of non-compliance pending the determination of the application for interpretation of art. 45 of the collective agreement filed by the applicant. The Industrial Court after hearing the submissions of both counsels for the applicant and the first respondent refused to grant the application to stay the trial. The Industrial Court decided that the hearing of the non compliance application ought to be proceeded with.

The issue raised was whether the first respondent should have lodged a complaint of non-compliance under s. 56 of the Act thus involving the enforcement jurisdiction of the Industrial Court rather than proceeded with the matter as trade dispute under s. 26 of the Act. Having not done so, the applicant then took the initiative to report such a dispute and the issue now becomes whether the Industrial Court ought to have proceeded to hear the application rather than proceed with the first respondent's application for enforcement.

As stated earlier the real matter in dispute between the applicant and the first respondent concern union leave as provided in art. 45 of the collective agreement. According to art. 45 that leave for union business shall be in accordance with the Act. The section of the Act that governs leave for union business is s. 6 which reads as follows:

> A workman intending to carry out his duties or to exercise his rights as an officer of a trade union shall in writing to his employer for leave of absence stating the durations of and the purposes for which such leave is applied for is for a period that is no longer than what is reasonably required for the purposes stated in the application.
>
> Provided that a workman shall not be entitled to leave with pay for the duration of his absence if the purposes for which he is absent from work are not to represent the members of his trade union in relation to industrial matters concerning his employer.

The applicant contends that s. 6 of the Act requires a workman who is an officer of the union to apply for leave from the applicant when he intends to carry out his duties or to exercise his rights as an officer of the union. The applicant further contends that in recognition of the requirement to obtain leave of absence from the applicant, the collective agreement provides that leave shall be applied for pursuant to art. 45 on the form set out in the Fourth Schedule. The application contends that art. 45 of the collective agreement vests the management of the applicant the discretion whether to approve the leave or otherwise subject to operational constraints of the applicant *inter alia*,

manning requirements and safety considerations of the applicant. Section 6 of the Act is to be read consonantly with art. 45 of the collective agreement and the terms of the Fourth Schedule. The applicant also states that due to the peculiarities of the upstream production activities in the oil and gas industry which require 24-hour off-shore operation, there has been an established practice between the applicant and the first respondent that the applicant will first evaluate and ascertain its operational constraints before any release of its employee who as an officer of the first respondent chooses to attend to union business on his workday.

The first respondent on the other hand, relying on s. 6 of the Act contends that so long as the duration of the leave for union business applied for is for a period that is no longer than what is reasonably required for the purposes stated in the application, the applicant must grant leave with pay. This, the union says is due compliance with art. 45. The union also contends that the application's reliance on operational requirements is in breach of the collective agreement.

I am of the view that the matter before the court is a trade dispute. This is a case involving a dispute between the employee and the union which is connected with the terms of the employment of the workman who are eligible to union leave. The dispute ought to be resolved through the trade dispute resolution process as provided by ss. 18 and 26 of the Act.

Thus, the first respondent should not have lodged a complaint of non compliance under s. 56 of the Act. This is because s. 56 of the Act is a summary enforcement procedure for clear cut cases of non-compliance of a term of an award or collective agreement. In *Holiday Inn, Kuala Lumpur, National Union of Hotel, Bar and Restaurant Workers* [1988] 1 MLJ 306, Seah SCJ dealt with the proper exercise of this jurisdiction and the function of the Industrial Court as follows:

> Now, s. 56 is concerned with the enforcement in a summary manner of an award made by the Industrial Court or of a collective agreement which has been taken cognizance of by the court under s. 17 after a complaint has been lodge as to its non-compliance. The non-compliance of a term of the award or collective agreement must exist as an antecedent fact before the Industrial Court can exercise its powers contained in subsection (2) thereof. It is therefore, a condition precedent to the exercise of those powers that there should be in existence a breach or non-observance of a term of the award or collective agreement. This must be satisfactorily established by the complainant ... .

The clear distinction between the interpretative and enforcement jurisdiction and function was expressed by the learned judge as follows:

> In my judgement, under section 56 of the Act the Industrial Court is charged with the enforcement of an award or collective agreement which has taken cognizance of by the court after a complaint has been received alleging non-compliance with one or more terms of the award or said collective agreement. On the authority of the *Federal Hotel Sdn. Bhd v. National Union, Bar & Restaurant Workers* [1983] 1 MLJ 175, the Industrial Court is not charged with the duty of interpreting a adjudicating the term or terms of an award or collective agreement which are disputed by the contracting parties concerned. Section 33 provides for this and the legislative has laid down certain procedures to be followed when a complaint is made pursuant to this section. The function of the Industrial Court under section 33 can only be exercised on a deficit application made for that purpose (see the *Federal Hotel* case). In other words, any question of interpretation or adjudication of a term of an award or collective agreement is not within the scope of section 56.

The Supreme Court in *Dragon & Phoenix Bhd v. Kesatuan Pekerja-pekerja Perusahaan Membuat Textil dan Pakaian Pulau Pinang & Anor* [1991] 1 MLJ 89 reiterates the distinction between the interpretative function and the enforcement function of the Industrial Court. Harun Hashim SCJ propounded as follows:

> In a complaint of non-compliance with any term of a collective agreement or award under s. 56 of the Industrial Relations Act 1967, the Industrial Court should, as the general rule, look at the terms of the contract by confining itself to within the four walls of the collective agreement or award and decide whether the term has or has not been complied with. It is a purely enforcement function. It should not embark on an expedition of examine the provision of the Employment Act 1955 in order to determine the meaning of the term complained of unless there is a specific reference to it because to do so would invoke the interpretative function of the court under section 33 of the Industrial Relation Act 1967 which is an entirely different exercise from that under s. 56. It is important to recognize the difference between these two functions of the court because failure to comply with an order under section 56 is an offence with penal provisions whereas there are no such consequences in respect of a matter dealt with under s 33. It is also important to separate the two functions in order to determine which particular jurisdiction the Industrial Court is exercising in any particular case. It may well be that in a dispute such as in the present case there should have been two separate applications to the court, the first under section 33 to invite the court to exercise its interpretative function and if there is still non-compliance, a second application for enforcement under section 56.

In *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748 CA the Court of Appeal citing the case of *(Dunlop Industries Employees Union v. Dunlop Malaysian Industries Bhd & Anor)* [1987] 2 MLJ 81 SC reiterated the principle that recourse to s. 56 was the proper course to take in a clear and uncontroverted case of mere non-compliance with a term of an award or collective agreement taken cognizance of the Industrial Court. Notwithstanding the above however, the Court of Appeal suggested by way of *obiter dicta* that there might well be an overlapping of the two jurisdictions and functions. Gopal Sri Ram JCA put the matter succinctly as follows:

> The dissenting judgement of Wan Sulaiman SCJ in *Holiday Inn, Kuala Lumpur v. National Union of Hotel, Bar & Restaurant Workers* [1988] 1 MLJ correctly recognizes that s. 33(1) and 56 cannot be treated as being housed in water tight compartment with no permissible overlap under any circumstances. The power of the court to interpret an award or a collective agreement which has been taken cognizance of cannot, to borrow the mere description language of Macbeth, be 'cabin'd, cribb'd and confined.

Accordingly, in my judgement, the question whether the court, when entertaining a complaint under s. 56 of the Act has indeed acted in excess of its jurisdiction by exercising its powers under s. 33(1) that depends upon the peculiar circumstances of a particular case.

> There may be circumstances, such as those as existed in *Federal Hotel v. National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175, which may warrant a superior court focusing the view that an error of law has been occasioned by the court's unwarranted transgression of power of interpretation when exercising its power of enforcement. On the other end of the seals, there may be cases in which an interpretative of an award or collective agreement is a sine quo non to ascertain whether there has indeed been non-compliance of the same. To say that in such circumstances the complaint is to be summonly driven away from the judgement seat because a question of interpretation has arisen, is to nullify legislative intent, namely, the expedition settlement of industrial dispute. If follows therefore, that the extreme proportion that the court, when considering a complaint under s. 56(1), may never interpret an award or collective agreement in any circumstances is fallacious and not worthy of a second glance.

It can be seen that the Supreme Court has carefully and cogently set out in *Holiday Inn and Dragon & Phoenix* the clear line to be drawn between the enforcement jurisdiction and the interpretation jurisdiction. This line has been made somewhat fuzzy by the Court of Appeal in decision in *Syarikat*

Kenderaan, Melayu Kelantan Bhd. But, I am of the view even if we take into account the attempt at watering down the effect of the Supreme Court in *Holiday Inn and Dragon & Phoenix*, the decision of the Court of Appeal in *Syarikat Kenderaan Melayu, Kelantan Bhd* will have the effect that recourse to s. 56 is only permitted in 'clear and uncontroverted case of mere non compliance.'

Thus, turning back to the instant case, the question that need to be asked is whether the matter before the Industrial Court is a clear and uncontroverted case of mere non-compliance. With respect, on the facts of this case, the matter is not a clear and uncontroverted case of mere non compliance. To me, the real issue before the Industrial Court was on the interpretation of art. 45 of the collective agreement read with s. 6 of the Act and the application for leave form set out in the Fourth Schedule. It follows that the first respondent ought not to have made a complaint under s. 56 of the Act alleging non compliance when its interpretation of the said article, section and form was disputed by the applicant. The interpretation of art. 45 concerns the question whether the granting of the union business leave is as of right or whether it is subject to discretion of the applicant taking into consideration its operational constraints, *inter alia* its manning requirements and safety consideration. In coming to its conclusion on the interpretation of art. 45 it is not sufficient that the Industrial Court merely examine the word, 'shall' appearing in art. 45 of the collective agreement and s. 6 of the Act or to construe the terms of the Fourth Schedule. It will require the Industrial Court to embark for an extended exercise of interpretation of article of the collective agreement and s. 6 of the Act together with the prescribed form set out in the Fourth Schedule of the collective agreement which the Industrial Court does not have the jurisdiction to do in a complaint of non-compliance lodged under s. 56 of the Act.

In conclusion, I am of the view on the facts of this case, the Industrial Court has no jurisdiction to hear the complaint of non-compliance under s. 56 of the Act as the matter should have proceeded either as trade dispute or an application for interpretation. Clearly, there is an error of law on the part of the Industrial Court. Accordingly, the applicant's application to quash the decision of the Industrial Court dismissing the applicant preliminary objection and an order quashing the first respondent complaint of non-compliance is allowed with costs.